United Association of Journeymen, Plumbers and Steamfitters of Mobile, Alabama, Local Union No. 119 and its agents Max Green and Walter Wilson (Mobile Mechanical Contractors Association, Inc.) *and* Joe Earl Little. Case 15-CB-2267

April 16, 1981

DECISION AND ORDER

On November 19, 1980, Administrative Law Judge William N. Cates issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, United Association of Journeymen, Plumbers and Steamfitters of Mobile, Alabama, Local Union No. 119 and its agents Max Green and Walter Wilson, Mobile, Alabama, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any like or related manner restraining or coercing employees in the exercise of their rights protected by Section 7 of the Act."

2. Substitute the following for paragraph 2(d):

"(d) Post at its business office, hiring hall, and meeting places copies of the attached notice marked 'Appendix.'[16] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Furnish said Regional Director with a sufficient supply of signed copies of the aforesaid notice for posting, if so desired, by employer-members of the Mobile Mechanical Contractors Association, Inc., at all locations where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material."

3. Insert the following as paragraph 2(e) and reletter the subsequent paragraph:

"(e) Notify the Mobile Mechanical Contractors Association, Inc., and its employer-members that it will not maintain or enforce the clause in its collective-bargaining agreement with that Association which accords job stewards an additional payment of 75 cents per hour since that clause has been found to be unlawful."

4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to register for referral or to refer for employment with the Mobile Mechanical Contractors Association, Inc., and its employer-members Joe Earl Little or any other qualified employee-applicants because of their lack of membership in our Local or because of any other unfair or arbitrary consideration.

WE WILL NOT maintain and enforce the clause in our collective-bargaining agreement with the Mobile Mechanical Contractors Association, Inc., which accords jobs stewards an additional 75 cents per hour because they are job stewards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL permit Joe Earl Little or any other qualified employee-applicant to register

[1] In the absence of exceptions thereto we adopt, *pro forma*, the findings that Respondent has violated the Act. The General Counsel has filed exceptions to the Administrative Law Judge's recommended Order and notice and requests that the narrow cease-and-desist language of the Administrative Law Judge's notice be changed to conform with the broad cease-and-desist language in par. 1(c) of the Administrative Law Judge's recommended Order. For the reasons set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we find a broad order is unwarranted under the facts of this case. Accordingly, we have modified the Administrative Law Judge's recommended Order by inserting the narrow "in any like or related manner" remedial language. However, we have found merit to the General Counsel's request to modify the Administrative Law Judge's recommended Order in other respects, and, as set forth in the Order below, we have modified the Administrative Law Judge's recommended Order accordingly.

for referral and refer them in accordance with the hiring hall provisions of the collective-bargaining agreement and without regard to their local union membership or any other unfair or arbitrary reason.

WE WILL make whole Joe Earl Little for any loss of earnings he may have suffered by reason of the discrimination against him, with interest.

UNITED ASSOCIATION OF JOURNEYMEN, PLUMBERS AND STEAMFITTERS OF MOBILE, ALABAMA, LOCAL UNION NO. 119

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge: This matter was heard before me on September 8, 1980, at Mobile, Alabama. The hearing was held pursuant to a complaint issued by the Regional Director for Region 15 of the National Labor Relations Board, on April 29, 1980, and is based on a charge which was filed by Joe Earl Little, an individual, hereinafter Little, on February 20, 1980. The complaint, in substance, alleges that United Association of Journeymen, Plumbers and Steamfitters of Mobile, Alabama, Local Union No. 119 and its agents Max Green and Walter Wilson, hereinafter Respondent or Union, has engaged in, and is engaging in, certain unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the National Labor Relations Act, hereinafter the Act, by refusing to register Little for referral and refusing to refer Little to employment with the Mobile Mechanical Contractors Association, Inc.; and by maintaining and enforcing a contract provision requiring payment of a higher wage rate exclusively to union stewards because they are union stewards. The issues in this matter were joined by Respondent's answer of May 23, 1980, wherein it denied the commission of the alleged unfair labor practices.

Upon the entire record made in this proceeding, including my observation of each witness who testified herein, and after due consideration of the briefs filed by counsel for Respondent, counsel for the General Counsel, and counsel for the Charging Party, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. THE LABOR ORGANIZATION INVOLVED

United Association of Journeymen, Plumbers and Steamfitters of Mobile, Alabama, Local Union No. 119, is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.[1]

[1] The complaint alleges, the answer admits, and I find that Max Green and Walter Wilson are agents of Respondent within the meaning of Sec. 2(13) of the Act.

II. JURISDICTION

In connection with representation of its members, Respondent has executed successive collective-bargaining agreements with organizations, including the Mobile Mechanical Contractors Association, Inc., hereinafter the Association. The contract in effect at all times material to this case was executed on July 15, 1978. The Association is an Alabama corporation composed of various employers engaged in pipe contracting, and exists at least in part for the purpose of representing its employer-members in negotiating collective-bargaining agreements with Respondent which represents certain employees of its employer-members. The Association's employer-members all have offices and facilities in Mobile, Alabama. During the 12-month period ending April 29, 1980, the Association's employer-members, individually and collectively, purchased and received goods and materials valued in excess of $50,000 directly from points located outside the State of Alabama. The complaint alleges, the answer admits, and I find that the Association and its employer-members are, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues which were raised by the pleadings are:

1. Did Respondent fail and refuse to register for referral and to refer employee Little to employment with the employer-members of the Association?

2. Did Respondent engage in the conduct described in paragraph above because Little was not a member of Respondent?

3. Did Respondent by maintaining and enforcing a contract provision with the Association which provided: "Job Steward shall receive same rate as foreman when the third (3rd) foreman is set up, and shall not be counted against crew size thereafter," cause or attempt to cause the employer-members of the Association to discriminate against employees in violation of Section 8(a)(3) of the Act by encouraging membership in, and loyalty to, Respondent by requiring payment of a higher wage rate exclusively to Respondent's stewards because they are stewards of Respondent?

B. *Background*

The collective-bargaining agreement between Respondent and the Association herein contains, among other terms, a provision which established Respondent as the sole and exclusive source of referral of employees to employment with the employer-members of the Association. The agreement also established a procedure for registration and referral of employees and applicants for employment with the employer-members of the Association. The agreement called for registration of qualified applicants available for employment as journeyman plumbers, refrigeration fitters, or pipefitters. The contract provided for the maintenance of two groupings in the out-of-work lists for the trades involved. All plumb-

ers, refrigeration fitters, or pipefitters with seniority[2] were to be registered in Group 1 and all other journeyman plumbers, refrigeration fitters, and pipefitters who were qualified, but without seniority, were to be registered in Group 2. The order of referral was first all journeymen from Group 1 would be referred in successive order as their names appeared on the out-of-work list until Group 1 was exhausted and then all journeymen from Group 2 would be referred as their names appeared on the out-of-work list. The nondiscrimination portion of the referral procedure stated in pertinent part as follows:

> Section 7. The UNION and Contractors agree that the referral of Journeyman Plumbers, Refrigeration Fitters, Pipe Fitters shall be on the following basis:
>
> (A) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, UNION membership, Bylaws, Rules, Regulations, Constitutional Provisions, or any other aspect or obligation of UNION membership, policies, or requirements.

C. *The Facts of the Alleged Refusal To Register or To Refer Little*

Little had been a member of certain affiliated locals of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, for a number of years prior to the hearing in this matter. Prior to 1974, Little was a member of an affiliated union, Metal Trades Local No. 436, in Pascagoula, Mississippi. In 1974, Little became a member of Affiliated Local 669 of the Sprinkler and Pipefitters Union which has its primary office and base of operations in Adelphi, Maryland, with geographical jurisdiction covering the entire United States. Little has made his home in the Mobile, Alabama, area for approximately 35 years.

Little testified that he first sought employment through Respondent in early 1975. Little obtained a travel card[3] from Local 669 immediately prior to seeking employment through Respondent Local 119. Little testified without contradiction that he attempted to present his travel card to then Respondent Business Agent Billy Govill who refused the card but referred Little for employment anyway.[4]

Little testified that he was laid off from employment at Marion Oil where he had been working for a contractor, which layoff he believed took place in April 1975.[5] Following his layoff at Marion Oil, Little returned to Respondent for referral to another job. Little was told by Respondent's agent, Max Green, that there was no work to which Respondent could refer him. Little stated he went to Respondent union hall almost daily thereafter inquiring about work. While present at the union hall to seek referral, Little testified he saw other individuals being referred to jobs while he in turn just kept sitting at the hall. Little stated he asked Agent Green to allow him to sign the "out-of-work" list. According to Little, Green told him "only local members signed the 'out-of-work' list and travelers didn't sign it . . ." Little testified he took Green at his word and left the union hall. According to Little this conversation took place a few days after his 1977 layoff from the Marion Oil project for contractor Campbell.[6]

Little stated that approximately 3 weeks after his conversation with Green he was referred to a job for contractor Campbell at Scott Paper Company. The job lasted a few months before Little was laid off again. He returned to the union hall for referral but did not attempt to sign the out-of-work book. Little stated he did not attempt to sign the out-of-work list because "I had already been told I couldn't sign the book by Mr. Green and I didn't ask him no more because I figured I couldn't sign it."

Date Went to Work	*Contractor*	*Place*	*Laid Off*
July 5, 1975	C. L. Sumlin	Scott	July 6, 1975
July 8, 1975	Campbell	Jacinto-port	July 15, 1975
Aug. 16, 1976	Lummus		Sept. 27, 1976
Dec. 6, 1976	Campbell	Degussa	May 6, 1977
May 11, 1977	Campbell	Marion Oil	July 28, 1977
Aug. 2, 1977	Campbell	Scott	Dec. 2, 1977
Dec. 15, 1977	Campbell	Leroy	April 3, 1978
June 6, 1978	S & H Mechanical	June 6, 1978	
June 7, 1978	Mobile Refrig.	Bookley	Aug. 20, 1979

[2] The seniority requirement of Group 1 was based on 1,200 hours per year of work for an employer-member of the Association for a period of 2 consecutive years, which work had to be performed in the geographical area (Mobile, Baldwin, Washington, Escambia, Monroe, Conecuh, Covington, Clark, and the southern half of Choctaw and Wilcox Counties) of the employer-members of the Association.

[3] Little described a travel card as the necessary papers for referral provided by a member's local, in this case Local 669, to the local from which the individual hoped to be referred from for employment, in this case Local 119.

[4] Respondent introduced, as Resp. Exh. 1, a summary of Little's work referrals from Local 119. Little testified to the accuracy of the summary which is as follows:

[5] As is indicated at fn. 4 of this Decision, Little's layoff at Marion Oil may have been as late as July 1977; it is noted that Little testified on direct without the benefit of Resp. Exh. 1.

[6] Respondent did not call agent Max Green as a witness. I credit Little's uncontradicted testimony with respect to the events following his layoff at Marion Oil and his attempts to sign the "out-of-work" register of Respondent.

Approximately 3 weeks after being laid off at the Scott Paper Company job, Little stated he was referred by agent Green to a job at Mobile Refrigeration.[7]

The employment of Little at Mobile Refrigeration lasted in excess of a year or until Little was laid off in August 1979. Prior to being laid off at Mobile Refrigeration, Little testified that he received a telephone call at his home in approximately June 1979 from Respondent's agent, Walter Wilson. Wilson told Little, "You are a traveler and we want you to do the right thing." According to Little, Wilson stated work was getting to where there was not any and continued, "If you're working, I want you to do the right thing." Little told Wilson he would consider it. Little testified it was his understanding that Respondent Agent Wilson wanted him to quit his job and give it to a member of Respondent Local 119.

According to Little, Wilson again spoke with him at the union hall in July 1979 regarding his job. Wilson told Little, "I still have a lot of local members on the books." Wilson inquired of Little if he were still working and stated, "I would like for you to consider, you know, what I talked to you about before . . . we need to put some of these people to work." Little told Wilson he would consider his request.

About the end of July or the beginning of August 1979, Wilson telephoned Little at home. According to Little, Wilson told him that he had approximately 150 Local members "on the books" with no employment position to place them in. Wilson stated to Little that work had really fallen off and told him, "You're not a member of this Local and we need to place some of our local members." Little told Wilson he had been working his job at Mobile regrigeration in excess of a year, that he had a family to support and needed his job. Little also told Wilson he had seen local union members report to the job at Mobile Refrigeration for work, stay a couple of weeks, and then leave, and he did not want to give up his job to someone who would work only a little while and then quit. Little concluded the telephone conversation with Wilson by telling Wilson he would consider his request.[8] Approximately 3 weeks later, Little was laid off from his job at Mobile Refrigeration.

The day following his layoff at Mobile Refrigeration, Little returned to Respondent union hall and spoke with Wilson about work. Wilson told Little there was no work available. Little testified that he did not attempt to sign the out-of-work book because "I had already been told I couldn't." According to Little, Wilson said nothing to him about signing the out-of-work list.

Little testified that he later returned to the union hall and spoke with agent Wilson, in which conversation he told Wilson he had heard that jobs were available at Scott Paper Company. According to Little, Wilson told him it was true that there were jobs at Scott Paper Company but he was going to try to place it with Local members. Little told Wilson he wanted to work the job at Scott Paper Company, and Wilson told him "he would place me out there if he couldn't get local members to go." Wilson told Little to come back later which Little did the following Tuesday.[9]

It is undisputed that Wilson and Little discussed job referral possibilities on September 3, 4, and 5, 1979. Little inquired of Wilson at the union hall on September 3, 1979, about referral. Wilson told Little that he had 130 people on the bench. Little told Wilson that he needed to go to work. Wilson informed Little, "Joe, I can't help you."

Little made no effort to sign the out-of-work work list on September 3, 1979, nor did Wilson advise Little in any manner to sign the out-of-work list.

Little returned to the union hall on September 4, 1979, and agent Wilson informed him that he had a call for people to work 7 days per week, 12 hours per day on a job in Butler, Alabama. Little inquired if the project was outside the work jurisdiction of Local 119 and was told by Wilson that it was.[10] Little rejected the Butler, Alabama, job and, as a result, Wilson testified, "I was very irritated" that a job had been offered to this man and he would not take it." Wilson testified he told Little, "I'll give you your travel card," and when Little told Wilson he would not take it, Wilson stated, "Well, I'll mail it back to your home local." Wilson testified that he instructed his secretary at that point to mail Little's travel card back to Local 669 in Maryland and his request was carried out.[11]

On September 5, 1979, Little spoke with Respondent agent Wilson at Respondent's Local union hall and told Wilson he had found himself a job at Cortaulds' North America plant in Mobile County, Alabama, and asked Wilson if the Union had any problems with his taking the job.[12] Wilson explained the constitutional requirements of Local 119 with respect to working a project

[7] Little was not very precise in recalling dates in his testimony; however, I do not find that to detract from his overall credibility. I consider fn. 4 of this Decision to set forth accurately the referrals and employment times of Little with respect to referrals made by Local 119 for Little.

[8] Wilson denies that the conversations attributed to him by Little occurred. Wilson testified that he only once tried to call Little during the time frame of these conversations and on that occasion he did not reach Little but rather spoke only with Little's wife. My observation of Little's testimony convinced me that he was telling the truth and, as such, I credit his testimony. I specifically discredit Wilson's testimony that the conversations never even took place. Moreover, agent Wilson testified to the same type requests being made earlier in the same year as the events in the case at bar when he testified in *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 119 (Southeastern Piping Contractors, Inc.)*, JD-794-79, Mobile, Alabama, November 20, 1979 (unpublished), that "he told Hembree and Ford that he expected them 'to do the right thing.'" Wilson explained that the "right thing" for a traveler, when members of the Local union were not working, is "to quit his job so that a local member can have the work."

[9] Wilson denied having any conversation with Little from August 20 (the date Little was laid off at Mobile Refrigeration) until September 3, 1979. I discredit Wilson's denial. Wilson acknowledged meeting with Little at the Respondent union hall on September 3, 4, and 5, 1979.

[10] Little testified that he did not want to leave the work jurisdiction of Local 119 because he wanted to fulfill the residency requirement toward membership in Local 119.

[11] Respondent agent Wilson testified that Little's travel card was returned from Local 669 to Local 119 in November 1979. Wilson stated that if Local 119 "held a hard line to the constitution, he [Little] would not be eligible [for referral so long as his travel card was not in Local 119]—if we drew a hard line."

[12] Local 119 had no contract with Cortaulds. Little testified that union scale at the time of his work at Cortaulds was $11.35 per hour, compared with $6.40 per hour paid by Cortaulds.

such as Cortaulds. However, because of the limitations involved in taking the matter formally before the Union, Wilson and a fellow agent gave Little permission to accept the job at Cortaulds.

Little was employed at Cortaulds from September 1979 until June 1980, at which time he was laid off. Little did not seek in any manner to be referred by Local 119 during his employment at Cortaulds. After Little was laid off from Cortaulds, he went to the union hall in August 1980 and asked to and did in fact sign the out-of-work list of Respondent Local 119.

The parties stipulated at the hearing of this case that the following individuals signed the out-of-work list of Respondent Local 119: Donald Frederickson signed the out-of-work list on August 21 and was referred to employment on August 30, 1979; Bill Brock signed the out-of-work list on August 29 and was referred to employment on September 3, 1979; R. M. Filbert signed the out-of-work list on September 7 and was referred to employment on October 8, 1979; and Donald Frederickson again signed the out-of-work list on September 7 and was referred to employment on September 22, 1979, and he also signed the out-of-work list again on October 16, 1979. Brock, Frederickson, and Filbert were all members of Local 119.

Respondent agent Wilson testified that, during the year 1979 while he was dispatcher for Respondent, no nonmember of Respondent signed the out-of-work list.

D. *Analysis and Conclusions With Respect to Failure To Register or To Refer Little*

The Board has held that the operation of a union hiring hall imposes considerable responsibilities on the union agents in charge of the hall. Thus, they must neither foster nor countenance discrimination with regard to access to, or referral from, the hall on the basis of international union membership, local union membership, or any other arbitrary, invidious, or irrelevant considerations. *Sachs Electric Company*, 248 NLRB 669, 670 (1980). Further, the Board has consistently held that a union violates Section 8(b)(1)(A) and (2) of the Act where it discriminatorily refuses to refer an employee or applicant for employment pursuant to the terms of an exclusive referral system. *Painters Local Union No. 1555, affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO (Alaska Constructors, Inc.)*, 241 NLRB 741, 742 (1979), and the cases cited at fn. 6 thereof.

The facts of the instant case establish a pattern and practice by which Respondent afforded preference to members of Respondent with respect to registration for and referral to jobs over nonmembers. Little was told by an agent of Respondent that "nonmembers" could not sign the out-of-work list. Little, as a nonmember of Respondent, was solicited by Respondent agent Wilson to quit his employment in order to make available a job position for a member of Respondent. Respondent agent Wilson made these requests of Little on several occasions, the most recent of which was approximately 2 to 3 weeks prior to Little's seeking Respondent to refer him to a job after being laid off in August 1979. I am persuaded that the fact that no nonmembers of Respondent signed the out-of-work list in 1979 is further evidence that Respondent operated its referral hall in a discriminatory manner in favor of members of Local 119. This unlawful preference for registration and referral accorded to members of Respondent is evidenced by Respondent agent Wilson's statement to Little that he would refer him after his August 1979 layoff to a job at Scott Paper Company if he could not get enough members to report to the job.

It is no defense to Respondent that Little did not articulate a specific request to sign the out-of-work list in August or September 1979 inasmuch as the facts of this case demonstrate it would have been an act in futility.[13] Additionally, Respondent agent Wilson had an affirmative duty to inform Little of the out-of-work list and that referrals were by contract to be made from that list. Inasmuch as Respondent has failed to advance any valid justification for its treatment of Little based on any necessity for the performance of its functions as a bargaining representative, I conclude and find that Respondent's actions of failing to register and refer Little on or about August 21, 1979, and thereafter, were arbitrary and capricious and in derogation of its duty of fair representation thereby discriminating against Little in violation of Section 8(b)(1)(A) and (2) of the Act. The Board has consistently held that it is not necessary to establish that jobs were available at the time of a request for referral in order to establish a violation. *Utility and Industrial Construction Company*, 214 NLRB 1053 (1974). See also *International Longshoremen's and Warehousemen's Union, Local 13 (Pacific Maritime Association)*, 228 NLRB 1383, 1386 (1977). However, in the instant case it is clear that members of Respondent were referred for employment subsequent to Little having made his request of Respondent for referral to employment.

I reject Respondent's defense advanced in its brief that Little had "a solid work record with employers having a contract with the Union since his first receipt of employment in June 1975" as missing the issue herein in that it appears any referrals Little or nonmembers obtained were referrals that were left over after members of Local 119 were referred for employment. Further, the allegations of unlawful conduct on the part of Respondent address a specific date, and the fact that an individual may have been referred prior to that date is not in and of itself a defense to later allegations of unlawful conduct on the part of Respondent.

Respondent at the hearing called as a witness Ronnie A. Phillips, business agent for Local 669 of which Little was a member. Phillips testified that Little had not sought referral through his own union local. I find the fact that Little did not seek referral from his own local union to be of no consequence as to whether a sister

[13] Respondent in its brief contends that a person seeking referral has a responsibility and an obligation to place his name upon the referral register or out-of-work list and cites *Boilermakers Local Union No. 83, AFL-CIO (Missouri River Basin Association; Reactor Controls, Inc.)*, 205 NLRB 951 (1973). In that case the Board adopted the Administrative Law Judge's Decision that the individual must somehow indicate, "directly or indirectly," that he wants work, to be placed on the out-of-work list. In the instant case, Little clearly conveyed to Respondent agent Wilson that he desired work.

local unlawfully refused to register or to refer an individual for employment.

E. *The Contract Provision Regarding Higher Wage Rates for Union Stewards*

It is admitted that Respondent, the Association, and the employer-members of the Association have maintained in effect and enforced article XIV, section 3(e), of the collective-bargaining agreement between Respondent and the Association which provides that:

> Job Steward shall receive same rate as foreman when the third (3rd) foreman is set up, and shall not be counted against crew size thereafter.[14]

The General Counsel contends that by maintaining and enforcing the quoted provision Respondent has caused and attempted to cause the employer-members of the Association to discriminate against employees in violation of Section 8(a)(3) of the Act by encouraging membership in, and loyalty to, Respondent in that the provision requires the payment of a higher wage rate exclusively to union stewards because they are union stewards, and that such conduct violates Section 8(b)(1)(A) and (2) of the Act.

No evidence was presented or developed at the hearing regarding this issue by any party other than the admission that the provision as set forth above was correct and that it was maintained and enforced by Respondent, the Association, and the employer-members of the Association.

The ultimate question for decision in the instant case is the lawfulness of additional compensation (75 cents) paid to stewards pursuant to the above set forth provision of the collective-bargaining agreement between Respondent and the Association.

The Board in *Dairylea Cooperative Inc.*, 219 NLRB 656, 658 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976), held that:

> . . . superseniority clauses which are not on their face limited to layoff and recall are presumptively unlawful, and that the burden of rebutting that presumption (i.e., establishing justification) rests on the shoulders of the party asserting their legality.

The granting of superseniority to stewards in areas other than layoff and recall tends to encourage union activism and to discriminate with respect to job benefits against employees who prefer to refrain from such activity. E.g., *Auto Warehousers, Inc.*, 227 NLRB 628 (1976), enforcement denied 571 F.2d 860 (5th Cir. 1978); *Preston Trucking Company, Inc.*, 236 NLRB 464 (1978), enfd. 610 F.2d 991 (D.C. Cir. 1979). The justification for superseniority with respect to layoff and recall is that it encourages the continued presence of a steward on the job to administer an agreement between parties. As set forth in the quote from *Dairylea*, a presumption of unlawfulness arises regarding any superseniority not limited to layoff and recall and the party asserting the legality of the clause has the burden of establishing a valid justification for its existence.

In the instant case, Respondent advanced no justification for the contract clause in question, but rather took the position that *Dairylea* did not apply because (1) seniority is not contemplated by the collective-bargaining agreement; and (2) there is no showing that the job steward must be a member of the Union, thus no evidence that the contract clause would or had caused union activism.

It is recognized that the job rights in *Dairylea* involved superseniority rights and other on-the-job benefits. However, the additional payment of 75 cents per hour to stewards in accordance with the contract provision in the case before me constitutes a benefit to stewards that is available only to stewards (unless the individual became a foreman for management). Since only stewards can receive the additional payment, the protected Section 7 rights of employees to refrain from engaging in union activities are abridged in violation of the Act. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 20 (Seaway Food Town, Inc.)*, 235 NLRB 1554, 1557 (1978). Employees have a Section 7 right to refrain from engaging in union activities and they should suffer no employment detriment because of the exercise of that right.

Although there is no showing on the face of the contract provision in question that an individual employee had to be a union member to be steward, the collective-bargaining agreement in the instant case does establish that job stewards are appointed by the business manager of Respondent Local 119. The Board recognized in *Dairylea* that a union will be assumed to select persons for steward who have the ability to perform effectively, and the Board further noted that the ability to perform effectively must include not only technical capability, but also a belief in and support for union policy and goals. The Board in *Dairylea* stated:

> Certainly in an area where "its own continued well being and future vitality" are at stake the Union will not turn for help to employees uninterested in its success, much less to those who are opposed to it. Consequently, if we are to deal with the real world of real—and we can add rational—union officers it is obvious that an employee must be a committed unionist if he is to have a chance to acquire the broad benefit preference provided by the super seniority clause. For him to refrain from union activities—as of course he has a right to do under the Act—would be to exclude himself from ever obtaining such preference. Furthermore, even if we were to concede—which we do not—that union activities play no part in the Union's selection of its stewards, they indisputably do play a decisive part in access to benefits under the clause. [219 NLRB at 657–658.]

Therefore, viewed realistically, the only way an employee can gain the preference to the on-the-job benefits of

[14] Respondent's counsel represented to the court at the hearing of this matter that the above language had been adopted into the new collective-bargaining agreement between Respondent and the Association. He stated the new agreement had been ratified and agreed to but as of hearing date it had not been printed.

the contract clause in the instant case is to be a good, enthusiastic unionist and thereby through such actions recommend himself to the union hierarchy for appointment to the office of steward. I therefore conclude and find that the 75-cent-per-hour wage difference paid to Respondent's appointed stewards was paid to them solely because they were stewards, thus encouraging union activism and as such constituted discrimination against employees who, in the exercise of their rights under Section 7 of the Act, preferred to refrain from such activity. Respondent failed to advance any justification for the disparate treatment. I therefore find Respondent violated Section 8(b)(1)(A) and (2) of the Act, as alleged in paragraphs 8, 9, and 10 of the complaint of the General Counsel.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set out in section III, above, occurring in connection with the operations described in section II, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent, United Association of Journeymen, Plumbers and Steamfitters of Mobile, Alabama, Local Union No. 119, is, and has been at all times material herein, a labor organization within the meaning of the Act.

2. The Mobile Mechanical Contractors Association, Inc., and its employer-members are, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Max Green and Walter Wilson have been, at all times material herein, agents of Respondent within the meaning of Section 2(13) of the Act.

4. Respondent and the Mobile Mechanical Contractors Association, Inc., have, at all times material herein, been parties to a collective-bargaining agreement which establishes Respondent as the sole and exclusive source of referral of employees to employment with the Association's employer-members.

5. By maintaining and enforcing a clause in its collective-bargaining agreement with the Mobile Mechanical Contractors Association, Inc., and its employer-members which accords job stewards an additional payment of 75 cents per hour, which benefits do not constitute terms and conditions of employment limited to layoff and recall, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

6. By discriminatorily failing and refusing to register for referral and to refer Joe Earl Little for employment pursuant to the exclusive referral system under its collective-bargaining agreement with the Mobile Mechanical Contractors Association, Inc., on August 21, 1979, and on subsequent dates, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I find it necessary to recommend to the Board that Respondent be ordered to cease and desist from engaging in those unfair labor practices.

Accordingly, Respondent is ordered to take certain affirmative action in order to effectuate the policies of the Act. Such affirmative action will include making Joe Earl Little whole for any loss of earnings he may have suffered by reason of the discrimination against him, computed on a quarterly basis, plus interest, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717–721 (1962); and *Florida Steel Corporation*, 231 NLRB 651 (1977). To facilitate the computation and assure Little of equal referral treatment, Respondent shall maintain and make available for the Board or its agents, upon request, out-of-work lists, referral cards, and any other documents and records showing job referrals and the basis for such referrals.

Further, having found that the contract provision which accords job stewards an additional payment of 75 cents per hour to be unlawful, I shall recommend that Respondent be ordered to cease and desist from maintaining and enforcing such clause in its bargaining agreement with the Mobile Mechanical Contractors Association and its employer-members. I further recommend that Respondent be ordered to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[15]

The Respondent, United Association of Journeymen, Plumbers and Steamfitters of Mobile, Alabama, Local Union No. 119, Mobile, Alabama, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing to register for referral or to refer for employment with the Mobile Mechanical Contractors Association and its employer-members Joe Earl Little or any other qualified employee-applicant because of their lack of membership in Respondent or because of any other arbitrary or unfair consideration.

(b) Maintaining and enforcing the clause in its collective-bargaining agreement with the Mobile Mechanical Contractors Association, Inc., which accords job stewards an additional payment of 75 cents per hour because they are job stewards.

[15] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of rights protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Permit Joe Earl Little to continue to register in its out-of-work referral list and refer him consistent with its contractual obligations without regard to his membership in Respondent or any other unfair or arbitrary consideration.

(b) Make whole Joe Earl Little for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Maintain and, upon request, make available to the Board or its agents, for examination and copying, out-of-work lists, referral cards, and any other documents and records showing job referrals and the basis for such referrals of employees, members, and applicants, which are necessary to compute and analyze the amount of backpay due Little and to assure him equal referral treatment.

(d) Post at its business office, hiring hall, and meeting places copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[16] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."